No. 87-980

In The

Supreme Court of the United States

October Term, 1988

In The Matter of B.B. and G.B. Minors.

Mississippi Band of Choctaw Indians,

Appellant,

v.

Orrey Curtiss Holyfield, Vivian Joan Holyfield, J.B. Natural Mother and W.J. Natural Father,

Appellees.

On Appeal From The Supreme Court of Mississippi

Motion For Leave to File Brief of Amici And Brief Of Amici Curiae Swinomish Tribal Community, Shoshone-Bannock Tribes, and Turtle Mountain Band of Chippewa Indians in Support of Appellant

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Motion For Leave To File Brief Amici Curiae

The Shoshone-Bannock Tribe, Swinomish Tribal Community, and Turtle Mountain Band of Chippewa Indians hereby respectfully move for leave to file the attached brief *amici curiae,* supporting reversal of the decision of the Mississippi Supreme Court of the decision in this case.

The written consent of counsel for appellees has been requested. No reply having been received, amici hereby file this motion for leave to file brief *amici curiae* pursuant to Rule 36.3 of the rules of the court. If written consent of counsel for appellees is subsequently obtained, such consent shall be filed with the court.

The interest of amici in this case are as follows:

1. Indian Tribes have an independent but equal interest in their children to that of the parents of such Indian children. The Tribe, as *parens patriae,* has an interest in insuring that its children grow up with a viable connection to the tribe.

2. The jurisdictional interest of the Mississippi Band of Choctaw Indians may be different than the jurisdictional interests asserted by amici tribes. The Choctaw Reservation was not created through a treaty with the United States and the modern existence of the Mississippi Band of Choctaw Indians is not the same as the continual governmental authority exercised by amici tribes since time immemorial.

3. Mississippi Band of Choctaw Indians has an interest in asserting continuation of the jurisdictional principles enunciated in *United States v. John,* 437 U.S. 634 (1978), which may be different than the interest of amici tribes under the Indian Child Welfare Act.

4. Amici Indian tribes are all involved in ongoing Indian Child Welfare Act proceedings in state court, and resolution of the instant case before the United States Supreme Court will have a significant impact on the ability of amici tribes to advocate their interests under the Indian Child Welfare Act in ongoing proceedings.

5. Affirmation of the decision of the Mississippi Supreme Court decision divesting Indian tribes of exclusive jurisdiction over children who are domiciled on an Indian reservation under tribal law, in favor a decision vesting state courts with jurisdiction over Indian children under the principle that such children are domiciled in the state under state law, will have a substantial adverse affect on the ability of amici tribes to maintain their viability as governmental entities recognized and protected by the United States Constitution.

6. The position of the Mississippi Band of Choctaw Indians with regard to how it views consents to adoption executed by adult members of the tribe may be different than the views of amici tribes on this issue.

7. Amici Indian tribes plan to address principles of preemption in Indian law, interpretation of federal statutes affecting Indian tribes, interpretation of the term "domicile" in federal statutes, and questions of tribal law and custom as they affect interpretation of the Indian Child Welfare Act in a manner different than those questions will be addressed by appellant Mississippi Band of Choctaw Indians.

For the foregoing reasons the Shoshone-Bannock Tribe, Swinomish Tribal Community, and Turtle Mountain Band of Chippewa Indians hereby seek leave of the court to file the attached *Amici Curiae* brief.

Dated this 28th day of July, 1988.

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On Appeal From the Supreme Court of Mississippi

Brief of Amici Curiae

INTEREST OF AMICI CURIAE

Amici curiae have a substantial interest in this case. They are federally recognized Indian tribes with governing bodies and court systems.

The issues raised in this case deal with jurisdiction of tribal courts in adoption cases involving children eligible for tribal membership. The jurisdiction and membership of amici will be affected by the decision in this case.

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SUMMARY OF ARGUMENT

The Indian Child Welfare Act of 1978 (ICWA) is rationally related to the fulfillment Congress' unique obligation toward the Indians and the preservation and protection of tribal self government.

The exclusive jurisdiction section of the ICWA confirms long standing Supreme Court precedent protecting tribal authority over the internal affairs of its members and preempting state jurisdiction in areas of critical interest to the tribe. Undefined terms in federal statutes are to be defined according to federal common law, consistent with the underlying purposes of the statute. The canons of construction applicable to Indian affairs are relevant to interpretation of the ICWA. Legislative history to the ICWA indicates congressional intent to defer to tribal decisions regarding custody of Indian children. Individual adult Indians domiciled on an Indian reservation may not waive the exclusive jurisdiction of the tribe. Questions involving tribal jurisdiction should be determined first by the tribal court. Existing case law under the ICWA is consistent with a federal common law definition of domicile fulfilling the intent of the Act. Tribal definitions of legal custody and of the responsibility of

the extended family in child rearing are entitled to deference by the court's and can best be applied in tribal court proceedings.

———o———

ARGUMENT

THE INDIAN CHILD WELFARE ACT IS A RATIONAL EXERCISE OF CONGRESSIONAL AUTHORITY OVER INDIAN AFFAIRS.

This case presents the first opportunity for the Court to review the Indian Child Welfare Act of 1978 (ICWA), 25 U.S.C. § 1901 *et seq.* The ICWA is a rational exercise of congressional authority over Indian affairs. *E.g., Application of Angus,* 655 P.2d 208 (Or. App. 1982), *rev. denied,* 660 P.2d 683 (1983), *cert. denied sub nom, Woodruff v. Angus,* 464 U.S. 830; *Matter of Guardianship of D.L.L. & G.L.L.,* 291 N.W.2d 278 (S.D. 1980).

The standard for review of federal statutes affecting Indians is set out in *Morton v. Mancari,* 471 U.S. 535 (1974):

> As long as the special treatment can be tied rationally to the fulfillment of Congress' unique obligation toward the Indians, such legislative judgments will not be disturbed. Here, where the preference is reasonable and rationally designed to further Indian self-government, we cannot say that Congress' classification violates due process.

471 U.S. at 555. In enacting the ICWA, Congress recognized that its trust obligation to Indian people encompasses a relationship between the protection of Indian

children and the preservation of tribal self-government: "[T]here is no resource that is more vital to the continued existence and integrity of Indian tribes than their children and that the United States has a direct interest, as trustee, in protecting Indian children who are members or are eligible for membership in an Indian tribe." 25 U.S.C. § 1901(3). *See Matter of J.R.S.*, 690 P.2d 10, 18-19 (Alaska 1984). Congress based this finding upon a realization that "child-rearing is an 'essential tribal relation'" and concluded that there can be "no greater infringement on the right of the • • • tribe to govern themselves than to interfere with tribal control over the custody of their children. . . ." H.R. REP. NO. 1386, 95th Cong. 2d Sess. 14-15 (1978), *reprinted at* 1978 U.S. CODE, CONG. & ADMIN. NEWS 7530, 7537 ("House Report") (*quoting Wakefield v. Little Light*, 347 A.2d 228 (Md. App. 1975)).

One court has ruled that Congress established an express trust relationship between the federal government and Indian tribes for the protection of Indian children in enacting the ICWA. *Navajo Nation v. Hodel*, 645 F.Supp. 825, 827-28 (D. Ariz. 1986).

THE ICWA CONFIRMS TRIBAL AUTHORITY OVER THE INTERNAL AFFAIRS OF ITS MEMBERS.

The question before the Court in this appeal is not whether the non-Indian adoptive parents are fit to raise the Indian children; it is whether the Choctaw tribal court retains jurisdiction to apply its tribal laws, customs and policies in determining the permanent custody of two Indian children born to two Indian parents domiciled on the Choctaw reservation.

The Court in an unbroken line of cases has upheld the sovereign authority of Indian tribes to regulate their internal affairs and social relations free from state interference. *E.g. Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832). As stated in *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324 (1983):

> The sovereignty retained by tribes includes "the power of regulating their internal and social relations," [citations]. A tribe's power to prescribe the conduct of tribal members has never been doubted, and our cases establish that "absent governing Acts of Congress," a State may not act in a manner that "infringed on the right of reservation Indians to make their own laws and be ruled by them." [citations].

462 U.S. at 332-33. Tribal sovereignty includes authority over adoptions of tribal members, *Fisher v. District Court*, 424 U.S. 382 (1976); domestic relations, *United States v. Quiver*, 241 U.S. 602, 604 (1916), and the membership status of tribal children. *Santa Clara v. Martinez*, 436 U.S. 49, 55-56 (1978).

The ICWA did not *grant* jurisdiction to Indian tribes over matters involving tribal children; it merely confirmed the Supreme Court precedents discussed immediately above, and also confirmed developing case law involving custody of Indian children which equated the "domicile" of an Indian child with the "arising on the Indian reservation" standard required to preempt the exercise of state authority. *Fisher v. District Court, supra*, 424 U.S. at 389; House Report, *supra*, at 21, 1978 U.S.C.C.A. at 7544 (citing *Wakefield v. Little Light, supra; Wisconsin Band of Potowatomies v. Houston*, 393

F.Supp. 719 (D.W.D. Mich. 1973); *In re Greybull,* 543 P.2d 1079 (Or. App. 1975); *In re Buehl,* 555 P.2d 1334 (Wash. 1976).

The present case is similar factually to the controversy before the Court in *Fisher v. District Court, supra.* Permitting the Choctaw mother to temporarily leave the reservation, consent to the adoption of her new children and thereby defeat tribal jurisdiction creates the same "substantial risk of conflicting adjudications affecting the custody of the child," and would cause the same "decline in the authority of the Tribal Court" that were present in *Fisher. Id.,* 424 U.S. at 388. As the Court concluded in that case, upholding the exclusive jurisdiction of the Tribal Court over custody matters involving Indian children benefits the class of which the Choctaw parents are members "by furthering the congressional policy of Indian self-government. [citation]." 424 U.S. at 390-91.

It would certainly be anomalous if federal policy implemented in legislation designed to improve the health status of Indians, *See, e.g.,* Indian Health Care Improvement Act, 25 U.S.C. § 1601, *et seq.,* which led to the provision of health facilities for the Mississippi Choctaws, also led to the loss of tribal jurisdiction of Choctaw children merely because the facilities for delivery of Choctaw babies happened to be off-reservation and the natural mother in this case had to leave the Choctaw reservation to give birth. *See* Appellant's Jurisdictional Statement, p. 4, n. 2.

THE UNDEFINED ICWA TERM "DOMICILE" MUST BE INTERPRETED CONSISTENTLY WITH THE PURPOSES OF THE ICWA AND IN ACCORDANCE WITH INDIAN CANONS OF CONSTRUCTION.

The ICWA states in relevant part: "An Indian tribe shall have jurisdiction exclusive as to any State over any child custody proceeding involving an Indian child who resides or is domiciled within the reservation of such tribe. . . ." 25 U.S.C. § 1911(a). The term domicile in this section is not defined in the ICWA. Legislative history to this section states that it confirms developing case law addressing the issue of domicile for Indian children, and decisions cited by Congress on this point are authority for how the term should be interpreted as used in the ICWA. House Report, *supra,* at 21, 1978 U.S.C.C.A.N. at 7544 (citing *Wisconsin Band of Potowatomies v. Houston; Wakefield v. Little Light; In re Greybull;* and *In re Buehl, supra.*

Well-settled rules of statutory construction hold that in the absence of a plain indication to the contrary, it is assumed when Congress enacts a statute it does not intend to make its application dependent on state law, *Dickerson v. New Banner Institute,* 460 U.S. 103, 119 (1983) (citing *NLRB v. Natural Gas Utility Dist.,* 402 U.S. 600, 603 (1971), and that the Court's task "is to interpret the words of [the statute] in light of the purposes Congress sought to serve." *Dickerson,* 460 U.S. at 118 (citing *Chapman v. Houston Welfare Rights Organization,* 441 U.S. 600, 608 (1979)). Undefined terms in federal statutes are controlled by federal common law consistent with the intent of the underlying statute, in the absence of an express in-

dication to the contrary. *E.g., Kantor v. Wellesley Galleries*, 704 F.2d 1088, 1090 (9th Cir. 1983); *Stifel v. Hopkins*, 477 F.2d 1116, 1120 (6th Cir. 1973); *Ziady v. Curley*, 396 F.2d 873, 874 (4th Cir. 1968).

It is clear that the ICWA does not refer to state law for interpretation of terms in the Act. Congressional findings specifically refer to the misapplication of state law and state judicial authority as one of the primary reasons leading to enactment of the remedial language contained in the ICWA. 25 U.S.C. § 1901(5). ICWA legislative history concludes that Congress "does feel the need to establish minimum *federal standards and procedural safeguards* in State Indian child custody proceedings designed to protect the rights of the child as an Indian, the Indian family and the Indian tribe." House Report, *supra*, at 19, 1978 U.S.C.C.A.N. at 7541 (emphasis added).

The intent of the ICWA was to confirm and strengthen tribal jurisdiction over Indian children by "deferring to tribal judgment on matters concerning the custody of tribal children." Part III, Department of the Interior, Bureau of Indian Affairs; Guidelines for State Courts: Indian Child Custody Proceedings, § A. Policy, 44 Fed. Reg. 67584, 67585 (Nov. 26, 1979) ("BIA Guidelines"). The ICWA not only confirmed existing tribal jurisdiction in 25 U.S.C. § 1911(a), it divested state courts of their valid, preexisting jurisdiction over off-reservation Indian children by requiring state courts to transfer state child custody proceedings involving Indian children to tribal court at the request of the tribe. 25 U.S.C. § 1911(b). To give states authority to interfere with the exercise of tribal jurisdiction through the application of state domicile

law would be an unwarranted intrusion on tribal sovereignty, and is preempted. *See New Mexico v. Mescalero Apache Tribe*, *supra*, 462 U.S. at 331-336.

Canons of construction developed by the Court to interpret and implement federal statutes affecting Indians support an interpretation of domicile under ICWA which protects and enhances tribal jurisdiction over Indian children. Two of the canons apply in this case. First, statutes passed for the benefit of Indian tribes must be liberally construed in favor of the Indians. *Bryan v. Itasca County*, 426 U.S. 373, 392 (1976). Second, any ambiguous expressions in statutes affecting Indians must be resolved in favor of the Indians. *McClanahan v. Arizona State Tax Comm'n*, 411 U.S. 164, 174 (1973). The ICWA must be liberally construed in favor of a result consistent with the Act's policies of deferring to tribal judgment on Indian child custody matters and keeping Indian children within their culture. BIA Guidelines, *supra*, § A, 44 Fed. Reg. at 67585. The Mississippi Supreme Court's ruling under state law, which resulted in divestment of the Choctaw tribal court's jurisdiction, cannot be reconciled with the purposes of the ICWA, and application of state law to interpret domicile under the Act must be preempted.

The only reference to state law and domicile under the ICWA appears in BIA Guidelines interpreting the Act. These Guidelines were published over a year after the ICWA was enacted. BIA Guidelines, *supra*. Several people commenting on the proposed guidelines recommended that definitions of domicile and residence for section 1911(a) be adopted to avoid any misinterpretation of these terms by state courts. The Bureau refused, stating:

"definitions were not included [in the guidelines] because these terms are well defined under existing state law. There is no indication that these state law definitions tend to undermine, in any way, the purposes of the Act." BIA Guidelines, *supra*, 44 Fed. Reg. at 67585.

There is no indication in this statement that Congress evidenced any intent to define domicile according to state law. *Cf. State ex rel. Juv. Dept. v. England*, 640 P.2d 608 (Ore. 1982) (specific reference to "state law" in definition of Indian custodian, 25 U.S.C. § 1903(6)). It does indicate that the BIA recognized that any definition of domicile which conflicted with the intent of the ICWA would be preempted.

Agency interpretations must be consistent with congressional purpose to be accorded deference. *Morton v. Ruiz*, 415 U.S. 199, 237 (1974). Also, "standard principles of statutory construction do not have their unusual force in cases involving Indian law." *Montana v. Blackfeet Indians*, 471 U.S. 759, 766 (1985). The BIA's application of state law in defining domicile under the ICWA is not entitled to deference by the Court under both of these holdings.

Federal courts have interpreted the term "domicile" as it relates to minors in the context of the federal diversity statute, 28 U.S.C. § 1332. *E.g., Ziady v. Curley, supra*, 396 F.2d at 874-75 ("citizenship" equals domicile). The *Ziady* court interpreted domicile in a manner consistent with the purposes of the diversity statute. *Id.*

THE QUESTION OF JURISDICTION SHOULD BE DETERMINED IN THE FIRST INSTANCE BY THE TRIBAL COURT.

The natural parents of the children at issue in this case were at all relevant times domiciled on the Choctaw Indian Reservation. Appellant's Jurisdictional Statement, p. 3. The general rule is that at birth, an illegitimate child takes the domicile of the mother as his domicile of origin. RESTATEMENT (SECOND) OF CONFLICT OF LAWS (1971), § 22, comment c. *See* also § 14. Arguably, the domicile of the children was with their mother on the Choctaw Reservation at birth, and the Choctaw tribal court had exclusive jurisdiction over the children under 25 U.S.C. § 1911(a). Not until the Mississippi courts issued rulings shifting the children's domicile off-reservation was there a question on this issue.

The Court has recently ruled in two cases involving competing federal and tribal court claims of jurisdiction that federal policy toward Indians requires tribal courts to be given the first opportunity to determine the question of jurisdiction. In *National Farmers Union Insurance Co. v. Crow Tribe*, 471 U.S. 845 (1985), the Court confirmed federal question jurisdiction to determine whether a tribal court has exceeded its jurisdiction. Despite this ruling, the Court concluded that the federal court should stay its proceeding to give the tribal court the first opportunity to determine its jurisdiction. 471 U.S. at 855-57. *See Iowa Mutual Ins. Co. v. LaPlante*, 480 U.S. —, 94 L.Ed.2d 10 (1987).

These two cases involved situations where tribal and federal courts both had jurisdiction, *National Farmers*,

or such jurisdiction was arguable. *LaPlante.* While the claim in the present case is that the Choctaw tribal court has *exclusive* jurisdiction, the rule of deference to tribal determinations of jurisdiction enunciated in *National Farmers* and *LaPlante* is also appropriate here.

This conclusion stems from the Court's ruling that determinations of tribal jurisdiction by *non-tribal* courts would interfere with the federal policy of protecting tribal self-government:

> [T]he federal policy supporting tribal self-government directs a federal court to stay its hand in order to give the Tribal Court a "full opportunity to determine its own jurisdiction." . . . [A]ccess to the federal forum would place it in direct competition with the tribal courts, thereby impairing the latter's authority over reservation affairs. . . . Adjudications of such matters *by any non tribal* court also infringes upon tribal lawmaking authority, because tribal courts are best qualified to interpret and apply tribal law.

LaPlante, supra, 480 U.S. at —, 94 L.Ed.2d at 20 (emphasis added). Similar principles underlie enactment of the ICWA. *See* 25 U.S.C. § 1901.

Courts generally have jurisdiction to determine their own jurisdiction. *See, e.g., United States v. United Mine Workers of America,* 330 U.S. 258 (1947). In the present case, however, the exercise of this rule of judicial authority served to undermine the authority of the Choctaw Tribal Court over its children, and to deprive the tribe of jurisdiction over custody decisions involving its children. Where the state court's exercise of such a rule "interferes or is incompatible with federal and tribal interests reflected in tribal law," *New Mexico v. Mecalero*

Apache Tribe, supra, 462 U.S. at 334, such exercise of state authority must yield to full implementation of the federal statute. *See Montana v. Blackfeet Tribe of Indians, supra,* 471 U.S. 759, 766 (1985).

OTHER CASE LAW ADDRESSING THE MEANING OF DOMICILE UNDER THE ICWA SUPPORTS EXCLUSIVE JURISDICTION IN THE TRIBAL COURT.

Several state courts have addressed the issue of exclusive tribal jurisdiction under the ICWA and the meaning of domicile in 25 U.S.C. § 1911(a). Until the decision of the Mississippi Supreme Court in the pending case, all of the courts to address the issue have confirmed the exclusive jurisdiction of the tribal court in factual situations where an Indian parent domiciled on a reservation has executed a consent to adoption of her child while outside the reservation. *Matter of Adoption of Halloway,* 732 P.2d 962 (Utah 1986); *Matter of Adoption of Baby Child,* 700 P.2d 198 (N.M. App. 1985); *In re Pima County Juvenile Action No. S-903,* 635 P.2d 187 (Ariz. App. 1981), *cert. denied sub nom, Catholic Social Services of Tucson v. P.C.,* 455 U.S. 1007 (1982).

The *Baby Child* case involved facts almost identical (except for the involvement of the father) to the case presently before the Court. The New Mexico Court of Appeals in *Baby Child,* however, concluded that the Indian child assumed its mother's on-reservation domicile at birth, giving the tribal court exclusive jurisdiction to decide the child's custody. 700 P.2d at 200-201. This holding is contrary to the decision of the Mississippi Supreme Court in the present case. The New Mexico Court of Appeals' ruling in *Baby Child* resulted in the dismissal

of a proceeding before the Court involving the domicile of the same child and the jurisdiction of the tribal court as decided in a separate state court proceeding. *See Pinto v. District Court*, No. 84-248, *appeal dismissed*, 472 U.S. 1001 (1985).

None of these three state cases directly addressed the issue of how the term domicile should be interpreted under the ICWA. All three applied state definitions of domicile without discussion, although the Utah Supreme Court in *Halloway* based its application of state domicile law on the reference to state law discussed earlier and contained in the BIA Guidelines, *supra*, 44 Fed. Reg. at 67585. *See* pp. 12-13, *supra*.

The *Halloway* decision contains an extensive discussion on the preemption of state law under the ICWA when application of state law would undermine the purposes of the statute and deprive Indian tribes of jurisdiction over their children. 732 P.2d at 965-970. The Utah Supreme Court's discussion parallels in many respects the discussion which appears in this amicus brief, and amici tribes urge the Court to adopt the analysis set out in *Halloway*. While amici tribes disagree with the Utah Supreme Court's conclusion that Congress left questions of domicile to be decided under state law in the ICWA, 732 P.2d at 967, the court reached the proper result when it held that "state law must bow when the application of that law brings the state and federal policies into conflict. [citation]." *Id.* A simpler result could have been reached if the court had merely adopted a *federal* definition of domicile consistent with the purposes of the ICWA.

AN INDIVIDUAL ADULT INDIAN DOMICILED ON AN INDIAN RESERVATION MAY NOT WAIVE THE JURISDICTION OF THE TRIBAL COURT.

The Mississippi Supreme Court ruled that the actions of the parents in this case were taken to deprive the tribe of jurisdiction over the children at issue. *Matter of B.B.*, 511 So.2d 918, 921 (Miss. 1987). This conclusion is contrary to well-settled case law of this Court holding that an adult Indian domiciled on an Indian reservation cannot waive the exclusive jurisdiction of the tribal court. *Fisher v. District Court, supra*, 424 U.S. at 390-391.

Two decisions incorporated by Congress in legislative history to the ICWA as support for the exclusive jurisdiction section of the Act follow the Court's reasoning in *Fisher*. *Wisconsin Band of Potowatomies v. Houston, supra*, 393 F.Supp. at 733; *Wakefield v. Little Light, supra*, 347 A.2d at 239. *See House Report, supra*, at 21, 1978 U.S.C.C.A.N. at 7544. These decisions evidence congressional intent to prohibit parental waiver of exclusive tribal jurisdiction while the parents are domiciled on a reservation. One court has affirmed this conclusion under the ICWA. *Matter of J.M.*, 718 P.2d 150 (Alaska 1986).

QUESTIONS INVOLVING TRIBAL CUSTOMS SHOULD BE DECIDED IN TRIBAL COURT.

The ICWA contains express congressional recognition of the "essential tribal relations of Indian people and the cultural and social standards prevailing in Indian communities and families." 25 U.S.C. § 1901(5). In many

respects these "relations" and "standards" differ from those of the majority culture. *See, e.g.,* House Report, *supra,* at 10, 1978 U.S.C.C.A.N. at 7532 ("dynamics of Indian extended families"); *In re J.J.S.,* No. WR-CV-21-83 (Nav. D. Window Rock, Nov. 4, 1983), *reprinted at* 11 Indian Law Reporter 6031, attached as Appendix A (Navajo common law of adoption), *Cf. Moore v. East Cleveland,* 432 U.S. 494 (1977) (constitutional recognition of extended family).

This Court held in *Santa Clara Pueblo v. Martinez,* 436 U.S. 49 (1978), that issues involving tribal members which "arise in a civil context, will frequently depend on questions of tribal tradition and custom which tribal forums may be in a better position to evaluate than federal courts." 436 U.S. at 71. Interference with tribal jurisdiction over such matters would "substantially interfere with a tribe's ability to maintain itself as a culturally and politically distinct entity." *Id.* at 72. The same principles are expressed through enactment of the ICWA in regards to state court involvement. Tribal jurisdiction over child custody decisions involving Indian children must be protected if tribal self-government is to be perpetuated.

CONCLUSION

For the foregoing reasons, the decision of the Mississippi Supreme Court in *Matter of B.B.,* 511 So.2d 918 (Miss. 1987), must be reversed and the exclusive jurisdiction of the Choctaw Tribal Court over the children in this case should be affirmed.

Respectfully submitted,

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APPENDIX A

(Reprinted from 11 Indian Law Reporter 6031)

NAVAJO DISTRICT COURT FOR
THE DISTRICT OF WINDOW ROCK

IN RE: J.J.S.

No. WR-CV-21-83 (Nav.D.Window Rock, Nov. 4, 1983)

Summary

Based upon Navajo common law regarding family and clan obligations, the Window Rock District Court grants adoption in this case to members of the child's extended family.

Full Text

Before TSO, District Judge

Statement of the Case

This is a case involving a minor child who is seriously neglected by his mother. The father of the child is unknown. As a result of the mother's severe neglect of the child her parental rights have been terminated pursuant to law. Upon termination of parental rights the natural mother expressed her desire that her child be adopted by Mr. Dan and Mrs. Helen Chee.

A petition for adoption is also pending before this court on the above-named minor child filed by Mr. Johnny and Mrs. Patricia Stephens. Mr. and Mrs. Stephens are not members of the Navajo Tribe.

The social workers submitted an excellent investigation report and recommendation. They have determined that both families are fit to raise the minor child. Mrs. Chee is a cousin to the child's natural mother and therefore a member of the extended family of the natural moth-

er and resides in Pine Dale, New Mexico within the jurisdiction of the Navajo Nation.

The court is confronted with the issue as to who should be appointed adoptive parents of this minor child since the two couples petitioning to adopt the child are both fit.

Applicable Law

The first thing this court must do is find which law applies in this case.

The trial court of the Navajo Nation has original jurisdiction over all cases involving the domestic relations of Indians, such as divorces, or adoption matters. 9 N.T.C. Section 1001 *et seq.*

The Navajo Tribal Code gives the court a choice of law to use in a given case.

7 N.T.C. Section 204, Law Applicable in Civil Actions, a. In all civil cases the Courts of the Navajo Tribe shall apply any laws of the United States that may be applicable, any authorized regulations of the Interior Department, and any ordinances or custom of the Tribe not prohibited by such federal laws.

The law is very clear if there is an applicable custom of the tribe not prohibited by federal laws then the court can apply those customs including any ordinances of the Navajo Tribe.

Navajo Common Law Defined

This court in its decision in the case of the *Estate of Apache,* WR-CV-197-82, [see 11 Indian L. Rep. 6005]

(Window Rock Dist. Ct. 1983), pronounced its preference for the term "Navajo common law" rather than "custom" for the reason that it is not widely understood that the customs and tradition of the Navajo people are law, and English term is used because it more accurately reflects our custom as law. The word "custom" for the purpose of the statute not only includes customs which may be testified to, noticed, proved, by expert testimony or otherwise shown by evidence, but it includes recorded opinions and decisions of the Navajo courts (not dealing with statutory interpretation or the application of principles of state or general Anglo-European law), and some learned treatises on Navajo ways, *id.*

American Law on Adoption

There are laws of the United States which this court can use in ruling on this case including the Indian Child Welfare Act (1978). This court can apply those federal laws in absence of a Navajo custom which is not prohibited by federal law. Fortunately, there is a Navajo custom that this court is aware of and can apply in deciding the issue in this case.

Adoption is a legal process by which the law makes a substitution of parents for a child and terminates the parent and child bond with the natural parents, at least legally speaking. The adoption process requires the termination of the legal bond with the natural parents because of the idea that there can only be one parent and child relationship at any one time. Clark, *The Law of Domestic relations in United States,* Section 18.1, p. 602 (1968).

An important point about Anglo-European adoption law is that it is a law which is created only by statute,

and it did not come to the United States courts through the English common or customary law. *Id.* at 603. As rseult, the current American law of adoption is recent and a product of modern American attitudes. There has also been a history of hostility towards the law of adoption in American courts, possibly due to the fact that it was not created over a long period of time by the courts to fit the needs of those who have come before them. *Id.*

Navajo Common Law on Adoption

The American law of adoption thinks in terms of duties. Natural parents have duties towards their children, and when those duties are breached, then the law will take the children away from the natural parents and give them to other parents. Navajo concepts are different and the following description has been made of Navajo legal attitudes towards family relationship.

> Navajos believe that each person has a right to speak for oneself and to act as one pleases. The mutual rights and duties of kinsmen normally discussed under the concept of the jural relations are best described as mutual expectations, rather than obligations. This distinction is a matter of emphasis and decreeing, but it is very real and worth noting. Desirable actions on the part of others are hoped for and even expected, but they are not required or demanded. Coercion is always deplored.

Witherspoon, *Navajo Kinship and Marriage,* pp. 94-95 (1975).

Therefore, the Navajo view of the relationship of children to parents is not one of a simple parent and child relationship, but an entire pattern of expectation and desirable action surrounding children. *Opinion of Court Solicitor,* 83-10 (1983).

A central concept of child rearing in Navajo society should be grasped before there is any discussion of the Navajo common law of adoption. One description of that concept is:

> The Navajo people identify themselves as "Dine," which means the people. The term is simply an expression of native pride or a message that conveys many things which are central in native feelings. One of the most important societal values included in this natural native feeling is the attitude towards children, they are highly valued and wanted. The basis for the Navajo life ethics was that the original parents of the first human infant pronounced a death penalty on any creator or being who mistreated the first child. This act or behavior would devalue or humiliate the supernaturals with whom the first human baby was identified. Therefore, in the Navajo religious context inhumane cruelty to children was prohibited.

Navajo Child Rearing Concept, Child Abuse and Neglect—A Navajo Perspective, Navajo Children's Legal Services, Draft Section of a Manual for Use in Child Welfare Services (1983).

The Navajo common law principle is one of the expectation that children are to be taken care of and that obligation is not simply one of the child's parents. The Navajo have very strong family ties and clan ties.

The term adoption is used by Navajo commentators on Navajo common law but is used in a different sense than that used in Anglo-European adoption statutes:

> Orphans of Navajo families or children of large families or broken homes are adopted by other family members or a family member of the same clan of the child.

Carl N. Gorman, *The Navajo Nation Is Made Up Of Many Clans*, Address to the Navajo Nation Children's Conference (1980) (published in *Dine Center for Human Development For Generations To Come* (1982).

Many Navajo adoptions have a different focus than Anglo-European law. As such, it is not principally concerned with the exchange of legal parents.

> Navajo adoption is based on need, mutual love and help. Children may or may not change the surname. Either way the family is a unit with strong, supportive, extended family and clan ties. It has worked for hundreds of years without adoption agencies and courts of law.

Id.

Another distinctive aspect of Navajo adoption is that it is not necessarily permanent.

> Adoption is merely a case of taking the children into the home for a limited time, or permanently, by extended family or parental agreement, depending on the circumstances. The child is raised and treated as one's own. Grandparents are sometimes the ones to take in and raise the young children belonging by birth to their own deceased or unwed children or other related family members.

Id.

> In Navajo Common Law a child is said to be born for his father's clan and a member of his mother's clan. This means that the child is an integral part

> of a functioning self-reinforcing and protecting group. Anglo-Europeon law is primarily concerned with immediate parent and child relationship while Navajo Law is concerned with the relationship of a child to a group which shares the expectation that its members will take care of each other's children.

Court Solicitor's Opinion, 83-10 (1983).

The correct statement of the Navajo common law of of adoption is that there is an obligation in family members, usually aunts or grandparents or a family member, who are best suited to assist the child to support and assist children in need by taking care of them for such periods of time as are necessary under the circumstances, or permanently in the case of a permanent tragedy affecting the parents. The Navajo common law is not concerned with the termination of parental rights or creating a legalistic parent and child relationship because those concepts are irrelevant in a system which has obligation to children that extends beyond the parents. Therefore, upon the inability of the parents to assist a child or following the occurrence of a family tragedy, children are adopted by family members for care which may be temporary or permanent, depending upon the circumstances. The mechanism is informal and practical and based upon community expectation founded in religious and cultural belief. *Opinion of the Solicitor to the Courts of the Navajo Nations*, No. 83-10, September 9, 1983.

Navajo Statutes on Adoption

The Navajo Tribal Council is presumed to have had the common law as discussed above in mind when it enacted the following statutes recited in the opinion and order of this court, ***In the Matter of the Estate of Boyd***

Apache, Cause No. WR-CV-197-83, October 11, 1983 (Citation omitted.):

1. 9 NTC Section 1256, states that after terminating the rights of parents, the court may place the child for adoption *under applicable laws and regulations.* (Emphasis added.)

2. 9 NTC Section 1192, states: "In placing the child under the guardianship or legal custody of an individual or of a private agency or institution, the court shall give primary consideration to the welfare of the child but, whenever practical, may take into consideration the religious preferences of the child and of his parent."

3. 9 NTC Section 1001 states that family ties should be preserved and strengthened whenever possible.

4. 9 NTC Section 1197 states that the court may make any other reasonable orders which are for the best interests of the child or are required for the protection of the public.

5. 9 NTC Section 615 expresses the policy of the Navajo Tribe in regards to the adoption of Navajo children, to wit:

(a) The Navajo Tribal Council favors the formal adoption of Navajo children in accordance with the provision of this chapter in all cases where the parents of such children are dead, or where such chilren are regularly and continuously neglected by their parents, or where the parents have abandoned such children. The Tribal Council looks with disfavor upon informal arrangements for the custody of such children except for temporary periods pending their formal adoptions.

(b) In the case referred to in subsection (a) of this section the Navajo Tribe neither favors nor disfavors adoption of Navajo children by parents who are not members of the Navajo Tribe but states as its policy

that each case shall be considered individually or on its own merits by the Tribal Court of the Navajo Tribe. Mr. and Mrs. Dan and Helen Chee.

Conclusion

In conclusion, the court rules that extended family member of the child and the natural mother has stepped forth and recognized and assumed her responsibility and obligation to care for a child who is severely neglected by the natural mother. The Social Services report as well as testimonies at trial also reveal that the home is a fit and appropriate place for the child to be raised and that it is in accordance with the Navajo common law and therefore it should grant adoption to that member of the extended family. A findings of fact and an order to this effect will follow forthwith, which is incorporated into this opinion by reference.